No. 10-939

In The Supreme Court of the United States

BARRY E. MUKAMAL, AS LIQUIDATING TRUSTEE AND DIRECTOR AND OFFICER TRUSTEE OF THE LIQUIDATING TRUST AND THE DIRECTORS AND OFFICERS TRUST OF FAR & WIDE CORPORATION, FAR & WIDE TRAVEL CORPORATION, ADVENTURE CENTER, INC., AFRICAN TRAVEL, INC., FAR & WIDE INTERNATIONAL, INC., AND TRAVEL MEDIA SERVICES CORP.,

Petitioner,

v.

PHIL BAKES; ANDREW C. MCKEY; CRAIG TOLL; GEORGE GREMSE; LOAN CAPITAL FUNDING, LLC; WELLSPRING CAPITAL MANAGEMENT LLC; CARL M. STANTON; GREG S. FELDMAN; DAVID C. MARIANO; AND JASON B. FORTIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the unpublished opinion of a unanimous panel of the court of appeals, affirming the dismissal of claims governed exclusively by Delaware law, presents an issue concerning pleading standards for a complaint that merits review by this Court, particularly where petitioner did not raise in the courts below the issue he now raises with this Court for the first time.

PARTIES TO THE PROCEEDING

The petition caption lists Wellspring Capital Funding LLC as a respondent. No entity by that name is a participant in these proceedings. The two respondents not listed by petitioner in the caption are Loan Capital Funding, LLC, and Wellspring Capital Management LLC. The caption of this brief reflects these corrections.

CORPORATE DISCLOSURE STATEMENT

Respondent Loan Capital Funding, LLC has no parent corporation, and no publicly held company owns 10% or more of its stock. Respondent Wellspring Capital Management LLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The petition here does not warrant this Court's review. The decision below involves the application of state, not federal, law. The purported "issue" concerning pleading standards that is raised in the petition was neither briefed nor argued in the district court or in the court of appeals because any difference in those standards was not in those courts – and is not here – determinative of the outcome. The unpublished, unanimous decision below presents no conflict among the circuits and does not otherwise meet any of the considerations supporting certiorari review set forth in Rule 10 of the Rules of this Court.

Moreover, the entire petition is based on the false premise that the proper standard for evaluating a complaint under Fed. R. Civ. P. 8 is that articulated in *Conley v. Gibson*, 335 U.S. 41 (1957). The petition references *Conley* a total of 28 times, a focus that stands in stark contrast to the total number of times that petitioner cited *Conley* in his initial brief, reply brief, and petition for rehearing in the court of appeals – zero. Petitioner's repeated citations cannot change the fact that this Court has already held that *Conley*'s "no set of facts" standard for evaluating motions to dismiss under Fed. R. Civ. P. 12(b)(6) "has earned its retirement," and "is best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

The heart of petitioner's argument – that "the traditional standard established in *Conley* remains in place and the clarification of *Conley* should no longer be characterized as imposing any stricter standard" (Petition at 23) – directly contradicts *Twombly*. And even if the argument were not foreclosed by *Twombly*, a case involving substantive issues only of state law surely is not the right vehicle for this Court to address that issue. The Court should deny certiorari.

STATEMENT OF THE CASE

Petitioner Barry E. Mukamal is the trustee of a "litigation trust" created during the chapter 11 bankruptcy proceedings of Far & Wide Corporation ("Far & Wide"), a Delaware-incorporated tour operator that filed for bankruptcy protection in September 2003 in the United States Bankruptcy Court for the Southern District of Florida. (App. 2.) Respondents were directors, officers, and/or investors in Far & Wide. (App. 3.)

Petitioner sued respondents for trying to protect the company's shareholder value during a period of financial turmoil at Far & Wide (which petitioner characterized as a breach of the duty of loyalty), and for not implementing the advice of expert financial consultants they had retained (which petitioner characterized as a breach of the duty of care). (App. 64-66.) Petitioner's amended complaint was based on the theory that at some point between the onset of Far & Wide's financial difficulties and its ultimate

bankruptcy filing, its directors and officers should have stopped exercising their fiduciary duties for the benefit of Far & Wide's shareholders (a group of which several of them were members), and should instead have directed their energies toward protecting Far & Wide's creditors. (App. 65.) Petitioner alleged that respondents' efforts to protect Far & Wide's shareholders caused harm to Far & Wide's individual creditors; that these efforts were in breach of respondents' fiduciary duties to Far & Wide and its creditors; and that the harm that these efforts allegedly caused to each of the individual creditors was the equivalent of harm to Far & Wide itself.

The allegations in the amended complaint centered on the incurrence of additional debt by Far & Wide. (App. 108.) As the district court explained, the amended complaint "alleges that the Individual Defendants were operating Far & Wide with the goal of generating a return for all shareholders alike," a goal that was consistent with their fiduciary duties under Delaware law. (App. 50-51.) Relying on well-settled precedent, the district court emphasized that "the mere act of incurring additional debt in the face of insolvency, alone, does not establish bad faith or disloyalty if the purpose was to maximize the value of the firm as to all shareholders." (App. 51.) Because petitioner premised the amended complaint's fiduciary duty claims "on a divergence of interests as between the Defendants and Far & Wide's creditors, not between Defendants and the entity or its minority

shareholders," the district court dismissed those claims with prejudice. (App. 52-53.)

In an unpublished opinion affirming the district court's partial final judgment against petitioner, a unanimous three-judge panel of the Eleventh Circuit held that, under governing Delaware law, respondents did not have any fiduciary duties to Far & Wide's individual creditors, and that the petitioner's pleadings had failed to allege any breach of fiduciary duty to Far & Wide itself. (App. 16-18, 22-26.) The unpublished opinion also held that respondents "discharged their obligations under the duty of care by hiring consultants and by considering the consultants' advice, even if they did not follow the advice." (App. 26.)

Even after entry of the partial final judgment that is the subject of the instant petition, four counts of petitioner's amended complaint still remain pending in the district court against the five respondents who filed claims in the bankruptcy proceedings for money owed to them by Far & Wide (including a $10 million loan from respondent Loan Capital Funding, LLC). Those pending claims, which are not at issue here, seek to subordinate, recharacterize or disallow those monetary claims against the bankruptcy estate. (App. 160-68.)

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW TURNS ON DELAWARE LAW, THE APPLICATION OF WHICH DOES NOT WARRANT THIS COURT'S REVIEW.

The court of appeals' unpublished opinion in this case involved an extensive analysis of the scope of corporate fiduciary duties under Delaware law. Petitioner has mischaracterized the opinion, however, as one rooted primarily in federal law. It was not. Indeed, petitioner himself noted the importance of Delaware law to the court of appeals' opinion when he filed a petition for rehearing that posited the following question as meriting further review by the court of appeals: "Whether the panel overlooked a decisive Delaware precedent that confirms the viability of the Amended Complaint's Direct-Debtor duty of loyalty claims even if Delaware law applies." (The other question presented by the rehearing petition was whether the unpublished opinion incorrectly applied Florida's choice-of-law rules to conclude that Delaware law, rather than Florida law, applied to the substance of petitioner's claims.) Petitioner does not even contend that the issues surrounding the interpretation and application of Delaware law are worthy of this Court's review.[1]

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[1] As part of petitioner's misdirected effort to reframe the court of appeals' unpublished opinion as one that hinges on matters of federal law rather than Delaware law, he now claims that he "takes no issue with the lower courts' interpretation of

(Continued on following page)

The court of appeals' opinion contained an extensive analysis of Delaware law on the fiduciary duties of corporate officers and directors. The opinion cited 15 decisions from Delaware state courts, and one Delaware treatise. Even the petition includes a discussion of several Delaware cases that this Court would need to evaluate in detail in order to decide whether pleading standards were properly applied. (Petition at 19.) The prominence of state substantive law in this case sharply distinguishes it from *Twombly* and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), both of which turned on application of Rule 8 pleading standards to claims involving federal substantive law – the Sherman Act in *Twombly*, and the U.S. Constitution in *Iqbal* (a *Bivens* action).

Thus, unlike in *Twombly* or *Iqbal*, further review of this case for purposes of developing the case law on Rule 8 pleading standards would require the Court to undertake an extensive analysis of state substantive law. Yet the court of appeals, like the district court before it, has already performed a comprehensive examination of relevant Delaware authorities, and properly determined that Delaware law does not

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state law." (Petition at 17.) That is a far cry from the position he took before the court of appeals, where he argued strenuously for the application of Florida rather than Delaware law, and simultaneously argued that, to the extent Delaware law applies, the district court had misinterpreted key Delaware decisions Then, in seeking panel rehearing, he claimed that the unpublished opinion was in error because (1) it misapplied Florida's choice-of-law rules, and (2) "overlooked a decisive Delaware precedent." Petitioner did not seek rehearing *en banc*.

recognize petitioner's claims. *See, e.g.*, App. 20-26 (portion of Eleventh Circuit's analysis of Delaware cases); *see also* App. 17-18 ("Because directors and officers do not owe a fiduciary duty to creditors, even after insolvency, the district court correctly dismissed the Debtors' creditors' direct claims for breach of fiduciary duty.") (interpreting *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007)); App. 22 ("In order to state a claim for breach of the duty of loyalty, the Trustee must allege facts that indicate either Far & Wide or its minority shareholders, not Far & Wide's creditors, were injured by the action of the Individual Defendants. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d at 361 (stating that breach of the duty of loyalty can exist where a fiduciary pursues his own interest over that of the shareholders)."); App. 22 ("Delaware law, however, does not recognize a cause of action for 'deepening insolvency.'").

The Eleventh Circuit's analysis of Delaware law was the centerpiece of its unpublished opinion. This Court, for good reason, does "not normally disturb an appeals court's judgment on an issue so heavily dependent on analysis of state law." *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 368 (1999); *see also, e.g., Runyon v. McCrary*, 427 U.S. 160, 181 (1976) ("We are not disposed to displace the considered judgment of the Court of Appeals on an issue whose resolution is so heavily contingent upon an analysis of state law"). Here, where Delaware law is central to the court of appeals' rejection of petitioner's claims,

the Court should follow its long-standing precedent and deny the petition.

Finally, petitioner does not even argue – and nothing in the unpublished opinion below suggests – that the court of appeals would have reached a different outcome even if it had applied the abrogated *Conley* standard. Because the application of the legal standard that petitioner contends should apply would not change the outcome of the case, petitioner essentially seeks an advisory opinion. This is not an appropriate basis for certiorari.

II. THE COURT OF APPEALS' OPINION DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER COURT OF APPEALS.

No circuit split exists with respect to the question of whether *Twombly* and *Iqbal* "simply reaffirmed the *Conley* standard" as posited by petitioner. (Petition at 17.) No court of appeals has adopted that formulation, notwithstanding petitioner's efforts to suggest that the Second, Seventh and Eighth Circuits have done so. To the contrary, all three of those circuits have expressly stated that the former *Conley* standard has been displaced by the new, higher standard articulated in *Twombly* and *Iqbal*. Contrary to the heading of point II of the petition here, the courts of appeals are not "deeply divided" about this issue. They are not divided at all.

A review of relevant decisions makes clear that the purported circuit split identified by petitioner does not in fact exist. For example, the Second Circuit case cited by petitioner, *Boykin v. KeyCorp*, 521 F.3d 202 (2d Cir. 2008), acknowledges that *Twombly* "explicitly rejected" the *Conley* articulation of Rule 8 pleading requirements, and acknowledged that *Twombly* established a "new standard for assessing pleadings under Rule 8(a)." *Id.* at 213. Petitioner simply ignores these portions of *Boykin*, which plainly contradict his assertion that the "Second Circuit holds that *Twombly* did not require a 'heightened' pleading standard." (Petition at 21 (citing *Boykin*).)

Likewise, notwithstanding petitioner's incorrect assertion that the Seventh Circuit "does not regard it as a new standard," that court has expressly characterized *Twombly* (and *Iqbal*) as embodying "the Supreme Court's *new pleading rule*." *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009) (emphasis added). The Seventh Circuit decision cited at pages 20 and 21 of the petition, *Brooks v. Ross*, 578 F.3d 574 (7th Cir. 2009), does not indicate anything whatever to the contrary (and indeed does not even mention *Conley*).

Petitioner also misunderstands the Eighth Circuit's decision in *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009). By replacing a single word with a bracketed substitute at page 22 of the petition, petitioner mischaracterizes *Braden* as standing for the proposition that *Twombly* and *Iqbal* did not change the Rule 12(b)(6) analysis in federal

courts. *Braden* does nothing of the sort. What the Eighth Circuit actually said in the misquoted portion of *Braden* is that *Twombly* and *Iqbal* did not change the requirement that "on a motion to dismiss, inferences are to be drawn in favor of the non-moving party." *Braden*, 588 F.3d at 595. *Braden* did *not* contain any conclusion that *Twombly* or *Iqbal* "simply reaffirmed the *Conley* standard," as is contended at page 17 of the petition. Indeed, the Eighth Circuit has expressly stated elsewhere that by "establishing a plausibility standard for motions to dismiss" in *Twombly*, this Court was "*overruling Conley v. Gibson*." *Gregory v. Dillards, Inc.*, 565 F.3d 464, 473 (8th Cir. 2009) (en banc) (emphasis added), *cert. denied*, 130 S. Ct. 628 (2009); *see also, e.g.*, *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 595 (8th Cir. 2009) (affirming dismissal of amended complaint for failure to state a claim, while recognizing that "the district court had noted that the Supreme Court's recent decision in [*Twombly*] had created a *higher pleading standard* than the standard in *Conley v. Gibson*") (emphasis added), *cert. denied*, 130 S. Ct. 3506 (2010).

Petitioner has attempted to manufacture the appearance of a circuit conflict in the application of *Twombly* and *Iqbal*. No such split exists. Indeed, petitioner cannot cite a single federal appellate decision that (when properly read) is in conflict with the Eleventh Circuit's decision in this case – which in any event is unpublished and non-precedential. *See* Sup. Ct. R. 10(a) (in deciding whether "compelling reasons" exist to grant certiorari, the Court considers

whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

Indeed, the petition's lack of merit is perhaps best highlighted by the first three words on page 1 of the Eleventh Circuit's opinion: "DO NOT PUBLISH." (App. 1.) The Eleventh Circuit's rules are clear that "Unpublished opinions are not considered binding precedent." *See* 11th Cir. R. 36-2. No basis exists for this Court to review an unpublished, non-binding decision that does not conflict with a decision of any other federal appellate court.

III. PETITIONER DID NOT RAISE THE ISSUE ON WHICH HE NOW SEEKS THIS COURT'S REVIEW IN THE DISTRICT COURT OR THE COURT OF APPEALS, AND THUS HAS WAIVED IT.

The district court expressly addressed *Twombly* in its order dismissing petitioner's fiduciary duty claims, which preceded issuance of the partial final judgment that was before the court of appeals. (App. 32, 50.) In discussing *Twombly*, the district court explained that the "previous standard that there be 'no set of facts' before a motion to dismiss is granted has thus been abrogated in favor of the requirement that a pleading must be 'plausible on its face.'" (App. 32.) The abrogated "no set of facts" standard to which the district court alluded was, of course, the one set

forth in *Conley v. Gibson*, 355 U.S. 41 (1957), which the district court also expressly addressed in dismissing petitioner's claims. (App. 32.)

Notwithstanding the district court's express discussion of the differences between the old *Conley* standard and the new *Twombly* standard, petitioner did not mention either of these decisions, or *Iqbal*, in either of his two briefs in the court of appeals. As a result, there was no argument (and presumably no consideration) in the court of appeals concerning the contours of the standard set forth in *Twombly*, or the ways in which that standard might be similar to or different from the prior *Conley* standard. Petitioner has thus waived any consideration by this Court of the question whether the *Twombly/Iqbal* standard is stricter than the *Conley* standard. *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("This Court, however, is one of final review, not of first view.") (internal quotation marks omitted); *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) ("We do not reach this issue because it was not raised or briefed below."); *Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982) ("This contention was not properly raised in the Court of Appeals and was not addressed by that court. We therefore do not address it.").

Finally, petitioner's waiver of his meritless argument for certiorari is underlined by the fact that he did not even raise the argument – or even mention

any of *Twombly*, *Iqbal* or *Conley* – in his petition for rehearing in the court of appeals. Having ignored three chances in the courts below to make his *Conley* claim, petitioner has presented no basis to support this Court hearing it for the first time.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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